Case No: 568080-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, et al.,

Appellants,

v.

City of Bainbridge Island, et al.,

Respondents.

On appeal of an order of the Kitsap County Superior Court,
the Honorable Tina Robinson, Case No. 15-2-00904-6

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Responses filed by the City and Ecology are built upon a revisionist history in which they disclaim any reliance by the City on the "precautionary principle" during the SMP update. They do so to avoid the statutory and constitutional questions presented. But the SMP states that the City relied on the "precautionary principle . . . as guidance in updating the policies and regulations of this SMP." AR 42 (SMP § 1.2.3). And the City admitted in its pleadings below that it had relied, in part, on "policy considerations" (AR 3968), including the "precautionary principle," when developing the conservation buffers. CP 533. Thus, in its final decision, the Growth Board concluded that the buffer sizes were driven, in part, by the City's preferred policy choices (AR 5825) and may not, therefore, comply with the recommendations of science. AR 5825, n.77.

Respondents' decision to ignore this pivotal and highly consequential fact leaves the substance of PRSM's statutory and constitutional claims largely unopposed. The SMP's buffer

provisions are not justified in the record and are, therefore, unlawful and unconstitutional. The Growth Board's decision must be reversed and the SMP invalidated.

CORRECTION TO RESPONDENTS' MISTATEMENTS OF FACT

A. The Record Confirms That the City Relied on the "Precautionary Principle" When Setting Buffer Widths

The City and Ecology assert that "[t]he City based the SMP and its buffer provisions on the scientific and technical information assembled by the City, not on the precautionary principle, as PRSM claims." City Br. at 54, *see also id.* at 6, 41; Ecology Br. at 2, 24, 27–28. That is not true.

The Introduction to the SMP declares that the City relied on the "precautionary principle . . . as guidance in updating the policies and regulations of this SMP." AR 42 (SMP § 1.2.3). The City's and Ecology's trial court briefs also admitted that the City had relied, in part, on the "precautionary principle" when

establishing buffer widths.[1] CP 533–34 (City brief admitting that it had relied on the "precautionary principle" but arguing that it did not "solely" or "exclusively" rely on the policy); CP 304 (Ecology brief acknowledging that the City's SMP was guided by the "precautionary principle" as authorized by WAC 173-26-201(3)(g)). Respondents' attempt to disavow any reliance on the "precautionary principle" is thwarted by this fact alone. RCW 34.05.558 (review of factual disputes "must be confined to the agency record."); *Arkison v. Ethan Allen, Inc*., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (Judicial estoppel "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."). But there is more.

[1] If true, the City's claim still begs the questions where, why, and how the principle was applied because, as a matter of law, the "precautionary principle" is only applicable where there is an "absence of relevant scientific information" on a topic. *Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693, 279 P.3d 434 (2012).

The record confirms that the City relied on the "precautionary principle" throughout the process of developing its buffer regulations. At an early "visioning meeting," City and Ecology representatives stated that the City "must" follow the "precautionary principle" when updating its SMP. AR 1285. When asked to justify that statement (AR 1285–86, 1290–92), a City official responded that the "precautionary principle" was a "requirement" of the process. AR 1291. Ecology, too, stated that the Guidelines "require the precautionary principle being taken when . . . developing . . . regulations to prevent potential losses in ecological functions." AR 1291. Later, other residents sought clarification of why and how the City was employing the "precautionary principle." AR 771–72, 2544, 3102. The City did not respond. *See*, *e.g.*, AR 3102.

The City, nonetheless, continued to follow the "precautionary principle" when developing its buffers. Specifically, City consultants and committee members tasked with coming up with recommendations for buffer widths

proposed conservation areas that were "larger than the bare minimum needed for protection" in order to avoid a "worst case scenario" and to "ensure [ecological] success in the face of uncertainty about site-specific conditions." AR 4314 (Addendum); *see also* AR 2400 (CETAC memorandum suggesting that government invoke the "precautionary principle" to go "beyond the absolute minimum buffers to protect ecological functions"); AR 4307–08 (recommending that the City base its default buffers on the precautionary assumptions about development impacts).

Although there is no record of the City Council's evaluation/application of science and the "precautionary principle," the City's administrative pleadings refute Respondents' claim that the buffer widths were based solely on science. City Br. at 54. Indeed, responding to an argument that the science was too conflicted to support the buffer widths, the City averred that the buffers can be upheld without a close examination of the science because they were based, in part, on

"policy considerations" that allowed it to depart from the recommendations of science. AR 3967–69; *see also* AR 3968 (arguing that, given the "limited role" that science played in its buffer determination, there was no need for the Board to review the alleged conflicts in the science).

The City's administrative brief explained that, under the SMA, the requirements to collect and consider science are procedural in nature. AR 3967–68 (citing RCW 90.58.100(1); WAC 173-26-110(3)). Once those requirements are satisfied, there is nothing in the Act requiring a science-based decision. AR 3968. The City, thereafter, explained that it had relied on nonscientific "policy considerations" to impose "wide buffers" on new development. AR 3968–69; *see also* AR 5825, n.77 (concluding that the buffers were set, in part, by policy and may not comply with science).[2] Critically, in offering this

[2] Although the Board did not address the parties' "precautionary principle" arguments, PRSM's appeal addresses this error. Opening Br. at 33.

explanation, the City cited only the consultant report (AR 3969) that had recommended precautionary buffers. AR 4314.

Respondents cannot disclaim the role that "policy considerations," including the "precautionary principle," played in establishing buffer widths. Bainbridge Island's residents are entitled to a decision based on the facts as memorialized in the record, not post-hoc arguments designed to avoid the statutory and constitutional implications of the City's chosen course of action.

B. The Record Confirms That PRSM Raised Its "Precautionary Principle" Claims Below

In another attempt to evade the questions presented, the City argues that PRSM did not raise its "precautionary principle" arguments to the Growth Board and may not therefore raise them here. City Br. at 38–42 (citing RCW 34.05.554(1)). Wrong again.

The record confirms that the issue was presented and argued by the parties below. *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wn. App. 250, 272, 255 P.3d 696 (2011) (looking to the

allegations and citations in the petition to determine if an issue was preserved); *B & R Sales, Inc. v. Washington State Dep't of Lab. & Indus.*, 186 Wn. App. 367, 382, 344 P.3d 741 (2015) (Courts will only refuse to hear an argument where the administrative record lacks "more than a hint or a slight reference to an issue."). PRSM's petition challenged the City's decision to impose buffers based on "policy unrelated to science" without adequate justification, specifically alleging that the City's decision violated WAC 173-26-201(3). AR 580–81. Critically, the only nonscientific policy contemplated by that subsection is the "precautionary principle." *See* WAC 173-26-201(3)(g) ("As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources."). The allegations in PRSM's petition, furthermore, tracked the language of that subsection by alleging that there was adequate science addressing the anticipated impacts of residential use to

limit buffer sizes to only that necessary to mitigate for those impacts. AR 580–81.

PRSM's prehearing brief also argued that the City had failed to support its policy-based buffers on the record because it "never addressed risks to ecological functions" resulting from residential uses.[3] AR 3706. PRSM also argued that the City had imposed oversized buffers based, not on science, but on its preference for providing more protection to the shoreline than is strictly necessary to mitigate for the minimal impacts of residential use. AR 3708. These arguments focus on the legal standards for invoking the "precautionary principle" (*i.e.*, known vs. unknown risk and measures that are more protective than necessary) as set out in WAC 173-26-201(3)(g). *See* Opening Br. at 39–40.

[3] Certainly, PRSM's administrative argument on this issue was shorter than here, and was presented under a generalized heading. But that is typical of a Growth Board argument where the agency demands "brevity" in briefs (AR 604), and directs the parties use the Board's reworded headings. AR 599–601.

The City's administrative brief confirms that it was aware of PRSM's arguments. The City brief admitted that the buffers were driven by "policy consideration[s]" due, in part, to "wide variations in the width of recommended buffers based on the characteristics of the particular site involved." AR 3968. That argument goes directly to the "uncertainty in the science" standard. WAC 173-26-201(3)(g). The City additionally stated that, because most of the shoreline was developed, it chose to follow a policy of demanding "as much protection as feasible" on those properties that are subject to prospective regulation—*i.e.*, adopting a "more protective" standard. AR 3969. This, too, is a policy ground that appears only in the WAC's "precautionary principle" provision. WAC 173-26-201(3)(g). To support this reasoning, the City cited a single consultant report (AR 3969), which happens to be the report that recommended buffers "larger than the bare minimum needed for protection" in order to avoid a "worst case scenario" and to "ensure [ecological] success in the

face of uncertainty about site-specific conditions." AR 4314 (Addendum).

The parties' administrative pleadings demonstrate an explicit attempt to secure a final determination on the legality of the City's policy-based buffers under the standards of WAC 173-26-201(3)(g). *King Cnty. v. Washington State Boundary Rev. Bd. for King Cnty.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) (to preserve an issue for appeal, the administrative pleadings should present an issue statement, cite relevant authority, or otherwise put the opposing party on notice of the nature of or basis for its challenge.).

The City, nonetheless, insists that PRSM should be barred from raising this issue on appeal because it did not use the term "precautionary principle" in its administrative pleadings. City Br. at 39–40. But the WAC itself does not use that specific term, referring instead to the limited circumstances in which a local government may impose measures that are "more protective" than necessary in order to avoid a risk of unanticipated harm.

WAC 173-26-201(3)(g). The fact that PRSM's petition tracked the language of the WAC establishes this issue was raised below. PRSM cannot be bound to use a catchphrase that does not appear in the regulation.

Even so, insofar as the City's reliance on the "precautionary principle" relates to PRSM's unconstitutional conditions claim, it is properly before this court because it was timely raised to the trial court, which was the first adjudicative body with authority over the claim. RCW 34.05.570(3)(a) (authorizing a party to raise constitutional challenges to an agency action for the first time on judicial review); *see also Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 647, 310 P.3d 804 (2013) (superior court has original jurisdiction "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (concluding that facial constitutional claims are independent of the administrative

proceeding even where "the federal constitutional claims were raised by way of a cause of action created by [the state's administrative appeal] law.").

ARGUMENT

I.

THE CITY VIOLATED THE LAW WHEN IT FOLLOWED THE "PRECAUTIONARY PRINCIPLE" WITHOUT JUSTIFICATION IN THE RECORD

The City's decision not to address its reliance on the "precautionary principle" is extremely consequential to this appeal. Indeed, the City does not contest that the record contains no evaluation of the prerequisites for invoking the "precautionary principle," as set out by WAC 173-26-201(3)(g) and *Yakima Cnty.*, 168 Wn. App. at 693. Nor does the City contest that it created no record of its reasoned process for following the "precautionary principle"—*i.e.*, the record lacks any explanation of how, where, and why the policy was applied—as required by *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835, 123 P.3d 102 (2005), and *Swinomish Indian Tribal*

Cmty. v. W. Washington Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 429, 166 P.3d 1198 (2007). The merits of PRSM's appeal stand unopposed.

The City's only response to this issue is a red herring. City Br. at 38–42. The Board's conclusion that the City satisfied the Act's requirements to collect and consider science has absolutely no bearing on the question whether the City created a record memorializing its application of the "precautionary principle." Indeed, as the City argued below, the requirement to collect and consider science is procedural in nature—there is nothing in the Act requiring the final SMP to be based solely on science. AR 3967–68 (citing RCW 90.58.100(1); WAC 173-26-110(3)). Thus, the City's lengthy discussion of science *that could have justified a buffer* (City Br. at 16–25, 38–42) constitutes the type of post-hoc argument that is not permitted under the clearly erroneous standard of review. *Swinomish*, 161 Wn.2d at 435 n.8. The Growth Board's decision should be reversed and the SMP invalidated.

II.

THE GROWTH BOARD ERRED WHEN IT FAILED TO GIVE EFECT TO IMPERATIVE LANUAGE IN THE SMA'S PUBLIC PARTICIPATION PROVISIONS

As set out in the Opening Brief, the plain language of WAC 173-26-090 directs the City to establish a "public participation program" that "**shall** provide for . . . consideration of **and response** to public comments." *Id*. (emphasis added). The City's response at 50–54 does not address this language and does not address the rules of statutory interpretation—the most basic of which is that all words in a statute must be given meaning. *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 221, 254 P.3d 778 (2011) (no word is superfluous). Another basic rule is that the use of the word "shall" creates a statutory imperative. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The Growth Board's decision to delete the words "shall" and "response" violates these basic rules. AR 5804 (*see also* AR 5799–5805, 5810–11)). The Board is, therefore, not entitled to deference and its decision must be reversed. *Bostain v. Food*

Express, Inc., 159 Wn.2d 700, 716–17, 153 P.3d 846 (2007) (an agency is due no deference when it interprets a statute in a manner that fails to give effect to a statutory mandate).

The City's claim that this argument was not raised below is baseless. City Br. at 50. PRSM's petition specifically alleged that the City violated RCW 90.58.130 and WAC 173-26-090 "by not responding to public comments." AR 572; *see also* AR 3694–95, 3703–03. And in support of that claim, PRSM's cited 495 public comments covering a wide range of topics to which the City had provided no substantive response. AR 3703 (citing AR 2475–2824). Among those comments were four that addressed the "precautionary principle"—all of which are reproduced in the record. AR 771–72, 1284–90, 2544, 3102. PRSM's citation and argument far exceeds the "hint or slight reference" standard for preserving an issue. *King Cnty.*, 122 Wn.2d at 670.

PRSM's decision to limit its current discussion to just four of the unanswered comments is, furthermore, appropriate because it relies on facts in the record to respond to the Board's

faulty reasoning. RCW 34.05.570(3)(d) (authorizing a party to seek review of an agency interpretation of the law). In the decision below, the Board itself sorted through the comments to select a handful that were duplicative; from that, it reasoned that a response was not required. AR 5804. In doing so, the Board ignored comments that had received no response anywhere in the record, among which were the "precautionary principle" comments. *Id*. Discussion of evidence presented but not addressed by an administrative agency is not only allowed on appeal, *Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 313, 495 P.3d 866 (2021), it is a basis for reversal. *Karanjah v. DSHS*, 199 Wn. App. 903, 925, 401 P.3d 381 (2017).

III.

THE CITY'S BUFFER PROVISIONS VIOLATE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

Ecology's response to the doctrine of unconstitutional conditions is also based on the incorrect, revisionist claim that the City had based the buffer widths solely on science, not the "precautionary principle." Ecology Br. at 2, 24, 27–28. But the record, discussed above, confirms that the City relied, in part, on "policy considerations," including the "precautionary principle," when setting buffer widths. *See* AR 42; AR 3968, CP 304, 533–34. This pivotal fact takes the case far outside the "ordinary" or "easy" circumstance where a municipality can point to the actual scientific methodology it employed to address nexus and proportionality. *Dolan v. City of Tigard*, 512 U.S. 374, 396, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (precautionary justifications do not allow a government to evade the requirements of nexus and proportionality); *see also F.P. Dev., LLC v. Charter Twp. of Canton, Michigan*, 16 F.4th 198, 207–08

(6th Cir. 2021) (tree replacement statute violated the doctrine where it was not supported by evidence relating to the "methodology and functioning" of its exactions). Instead, this case presents the very different circumstance where the government based its exaction on nonscientific policy grounds that are not memorialized in the record, and where the chosen policy compels an exaction that shifts preexisting public burdens onto individual property owners. *Dolan*, 512 U.S. at 384 (One of the "principal purposes" of the doctrine is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)); *see also Honesty in Envtl. Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (failure to rely on science when establishing conservation buffers may lead to conditions that are constitutionally prohibited).

A. PRSM's Facial Claim is Justiciable; the Burden of Demonstrating Nexus and Proportionality is on the Government

As an initial matter, Ecology agrees that PRSM's facial unconstitutional conditions claim is justiciable. Ecology Br. at 28; *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072, 2079, 210 L. Ed. 2d 369 (2021) (the doctrine applies to conditions imposed pursuant to generally applicable regulations); *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022) (reaching same conclusion when reviewing facial and as-applied claims). Moreover, Ecology agrees that, on facial review, the SMP "must [be shown to] comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications." Ecology Br. at 28 (quoting *HEAL*, 96 Wn. App. at 533); *see also Cedar Point*, 141 S. Ct. at 2079 (confirming that *Nollan/Dolan* established a distinct constitutional theory and is subject to its own unique test); *KAPO*, 160 Wn. App. at 273 (holding, on facial review, that the

government must create a record sufficient to show that critical area buffers "comply with the nexus and rough proportionality tests").

Although Ecology insists that PRSM should bear the burden of establishing a violation of nexus and proportionality, it cites no caselaw supporting that argument. Ecology Br. at 19–20 (citing only the facial standard for proving a general regulatory taking—a constitutional theory that is not applicable here). That is because, as set out in the Opening Brief at 58–59, the standard for proving a facial violation of *Nollan/Dolan* places only the initial burden of showing that the condition demands an interest in property on the plaintiff. *See*, *e.g.*, *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1081, 1082–83 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017). Once that threshold requirement is met, the burden shifts to the government to show that the dedication satisfies the nexus and proportionality tests. *See*, *e.g.*, *Levin*, 71

F. Supp. 3d at 1082–83; *All. for Responsible Plan. v. Taylor*, 63 Cal. App. 5th 1072, 1084–87, 278 Cal. Rptr. 3d 376, 385 (2021).

The U.S. Supreme Court's decision to place this burden on the government is a substantive component of the doctrine. *Dolan*, 512 U.S. at 391; *see also id*. n.8 (explaining that, under the doctrine of unconstitutional conditions, the government is not entitled to deference). It is also functionally necessary in circumstances like those presented here (*i.e.*, where the record is silent) because the government is the party best suited to address the methodology it employed when developing a regulatory exaction. *Cf.*, *F.P. Dev.*, 16 F.4th at 207–08 (memorializing a record of the government methodology's often makes the nexus and proportionality inquiries easy).

B. The Buffer Provisions Exact a Specific, Identifiable Property Interest

Ecology's claim that the conservation buffer requirement does not constitute a dedication under *Nollan* and *Dolan* is baseless. According to the U.S. Supreme Court, a permit condition effects a dedication when it demands that "a specific,

identifiable property interest" be put to a public use as a condition on the use of property.[4] *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *see also id*. at 612 (the government may not condition permit approval upon the surrender of a property interest that would effect a taking if directly appropriated). That standard is clearly met here. Indeed, the Court need look no further than *City of Tacoma v. Welcker*, in which Washington's Supreme Court held that the acquisition of a riparian buffer to protect water quality constitutes an exercise of eminent domain. 65 Wn.2d 677, 683, 399 P.2d 330 (1965). But there is more.

Washington law holds that conservation buffers constitute a distinct property interest. RCW 64.04.130 ("a development right, easement, covenant, restriction, or other right . . . to

[4] Contrary to Ecology's argument, this inquiry does not turn on whether the demand destroys a fundamental element of property, such the rights to use, alienate, or exclude. *Koontz*, 570 U.S. at 614. If it did, the buffer provisions would be subject to the per se fundamental element takings test of *Cedar Point*, 141 S. Ct. at 2079.

protect . . . or conserve . . . constitutes and is classified as real property."); *see also Klickitat County v. Wash. State Dep't of Revenue*, No. 01-070, 2002 WL 1929480, at *5–6 (Bd. Tax App., June 12, 2002) (a buffer area is a separate interest from the lot; the holder of the conservation interest owns that interest). And numerous U.S. Supreme Court and Washington state cases have held that conservation buffers and set-aside areas are dedications subject to the nexus and proportionality tests. *See Dolan*, 512 U.S. at 393–94 (stream buffer); *Koontz,* 570 U.S. at 601–02 (fee imposed in lieu of conservation easement); *KAPO*, 160 Wn. App. at 273 (shoreline buffers); *HEAL*, 96 Wn. App. 533 (critical area buffer); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 758–59, 49 P.3d 867 (2002) (reservation of open space); *Trimen v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994) (open space set aside); *Citizens' All. for Prop. Rts. v. Sims*, 145 Wn. App. 649, 670, 187 P.3d 786 (2008) (reservation of open space for environmental purposes).

The fact that the SMP does not require a formal conveyance of a conservation easement does not compel a different conclusion.[5] *Cedar Point*, 141 S. Ct. at 2067 (holding that the classification of an interest in property need not match precisely the statutory definition of an easement for the Takings Clause to apply: "Under the Constitution, property rights 'cannot be so easily manipulated.'"). Indeed, the *Nollan/Dolan* doctrine is not limited to any specific category of property conveyance—it applies to all dedications of land. And the common law places no formalities on dedications, requiring only that the owner assent to put land to a public use. *City of Cincinnati v. White's Lessee*, 31 U.S. 431, 440, 8 L. Ed. 452 (1832); *see also Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 129, 336 P.3d 632 (2014) (same); *Town of Moorcraft v. Lang*,

[5] Although the City and Ecology take issue with the term "conservation easement" here, it should be noted that neither challenged from the Growth Board's characterization of the buffers as "conservation easements." AR 5849–52; *see also* AR 3847 (Ecology prehearing brief, repeating "conservation easement" characterization without objection).

779 P.2d 1180, 1183 (Wyo. 1989) (while a dedication does not transfer title, it does reduce an owner's rights by creating enforceable public rights in the dedicated land). Thus, courts have widely held permit conditions subject to the doctrine of unconstitutional conditions where the dedication is enforceable, as is the case here. *See*, *e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *id*. at 859 (Brennan, J., dissenting) (dedication achieved via deed restriction); *see also McConiga v. Riches*, 40 Wn. App. 532, 537, 700 P.2d 331 (1985) (the government's issuance of a conditioned permit creates a dedication); *Farrell v. Board of Comm'rs, Lemhi County*, 138 Idaho 378, 64 P.3d 304 (2002) (the government's approval of a conditioned permit created a dedication), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012). This alone should decide whether the SMP exacts a property interest. But there is even more.

The SMP also demands that owners dedicate their labor to maintaining the property as a conservation area (AR 104–05

(SMP § 4.1.5.4(2); SMP § 4.1.2)), which also effects a dedication of a specific property interest to a public use since the U.S. Supreme Court has ruled that an individual holds a fundamental property right in the fruits of his or her labor. *Horne v. Dep't of Agric.*, 576 U.S. 350, 367, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) (a regulation that appropriates the benefits of one's labor effects a per se taking); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) (finding a property right in the fruits of one's labor).

The imposition of a conservation buffer, moreover, unquestionably constitutes a public use. As stated above, binding precedent holds that the acquisition of a riparian buffer to protect water quality constitutes a public use. *Welcker*, 65 Wn.2d at 683; *see also Casitas Mun. Water Dist. v. United State*s, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (a stream buffer is "for government and third party use—the public—which serves a public purpose."); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1018–19, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (concluding

in the context of a regulatory taking analysis that a statute imposing a coastal buffer setback put private property to a public use).

Instead of addressing this large body of published on-point caselaw, Ecology relies on a single sentence culled from an unpublished Division I decision to argue that the SMP does not exact property for a public purpose. Ecology Br. at 37 (citing *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204, at *8 (Wash. Ct. App. Aug. 10, 2015) (unpublished)). But to reach that conclusion, the unpublished decision had incorrectly asked whether the buffer demand effected a *regulatory* taking of all economically viable use, not whether it demanded a specific, identified property interest as a condition of permit approval. *Id*. As clarified in *Cedar Point*, those are distinct and separate inquiries arising from different constitutional doctrines. 141 S. Ct. at 2079. Thus, the unpublished decision is doctrinally mistaken and provides no basis to depart from binding caselaw.

C. Ecology Does Not Address the Facts of the Case and Cannot Demonstrate Nexus and Proportionality

Ecology's discussion of nexus and proportionality is based on the false assertion that the City had set the buffer sizes solely based on science, not policy grounds. Ecology Br. at 29–32. Thus, Ecology avoids the facts of the case, offering in their place hypothetical, post-hoc justifications for the buffers. *Swinomish*, 161 Wn.2d at 435 n.8; *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138, 449 P.3d 269 (2019) (in evaluating nexus and proportionality, the court must look only to the justifications memorialized in the record; it may not consider post-hoc arguments). As a result, Ecology leaves the merits of PRSM's constitutional challenge unaddressed.

Even so, Ecology's hypothetical discussion of how science could have satisfied nexus and proportionality—*had the City chosen to base its buffers solely on science, which it did not*—fails to address the substance of those tests. *Church of Divine Earth*, 194 Wn.2d at 138.

Levin illustrates how the nexus and proportionality tests are facially applied. 71 F. Supp. 3d 1072. There, San Francisco had enacted an ordinance requiring landlords to pay a "tenant relocation fee" as a condition on a permit to remove rent-controlled property from the market. *Id*. at 1075–79. *Levin* found that the fee violated nexus because the problem that the exaction sought to alleviate—the lack of affordable rental housing—was a preexisting problem that was not attributable to any individual landlord. *Id*. at 1084. Moreover, the city was unable to show that the fee schedule was proportional to the impact that withdrawing a single unit would have on the city's rental market. *Id*. at 1084–85. Ultimately, although it noted that the withdrawal of a single unit could have *some* impact on the public problem, the *Levin* court concluded that the ordinance, as written, sought to "force the property owner to pay for a broad public problem not of the owner's making"—in that circumstance, the exaction could not satisfy proportionality. *Id*. at 1086.

Here, as in *Levin*, the public problem addressed by the SMP's buffer provision is simply too broad. Rather than limiting the buffer to mitigation of project impacts, the SMP states that the purpose of the conservation buffer is to protect against "loss that may result from cumulative impacts of similar developments over time." *See* AR 98–99 (SMP § 4.1.2.1); *see also* AR 106 (SMP § 4.1.3.3(2)) (buffers are designed to "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities"); AR 50 (SMP § 1.5) (The "over-arching goal of this master program is to ensure that future use and development of the City's shoreline . . . achieves a net ecosystem improvement over time.").

The City's science, however, confirms that this problem is largely attributable to existing residential development, roads, drainage ditches, and other public faculties. AR 4097–4100; *see also* AR 4299–4302 (discussing the impacts caused by established uses). The science also concludes that the anticipated impacts of new residential development are minimal and could

be avoided or fully mitigated by the project proponent. AR 4098. Furthermore, the science notes that any non-mitigated impacts would likely be offset by the City's planned restoration projects. AR 2206. The record, therefore, confirms that new residential development will not "create or exacerbate" the loss of shoreline ecological functions resulting from the cumulative impacts of development over time. *Church of Divine Earth*, 194 Wn.2d at 138. Ecology cannot satisfy the first prong of the nexus inquiry.

Nor can Ecology show that the City satisfied the second part of the nexus inquiry, which asks whether "the proposed condition will tend to solve or alleviate the public problem." *Church of Divine Earth*, 194 Wn.2d at 138. That is because the City's decision to exact "wide buffers" from new development was based on precaution and expedience. Indeed, the City explained that it chose to exact "as much [land] as feasible" from new development because it could not demand larger buffers from existing homeowners. AR 3969. The City also explained that it chose to focus on new development because demanding

the same buffers from existing residences could render those homes "non-conforming."[6] *Id*. Neither justification satisfies the second part of the nexus inquiry.

Finally, Ecology cannot "show that the condition is roughly proportional to the development's anticipated impact" based on the record. *Church of Divine Earth*, 194 Wn.2d at 138. Indeed, Ecology does not dispute that the SMP's buffer provisions are designed to protect against "loss that may result from cumulative impacts of similar developments over time." *See* AR 98–99 (SMP § 4.1.2.1); *see also* AR 106 (SMP § 4.1.3.3(2)). As in *Levin*, the City's decision forces owners of new development to dedicate property to solve a broad public

[6] However laudable that goal may be, "there are outer limits to how this may be done." *Dolan*, 512 U.S. at 396; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

problem not of their making. 71 F. Supp. 3d at 1086. That demand facially violates the proportionality rule.

The fact that the Guidelines "require jurisdictions to evaluate and consider cumulative impacts" when developing SMP regulations, (Ecology Br. at 32 (citing WAC 173-26-186(8)(d))), does not erase the fundamental protections guaranteed by *Nollan/Dolan*. *Dolan*, 512 U.S. at 396. Indeed, the Guidelines insist that "regulations and mitigation standards" be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i). And in regard to the nexus and proportionality tests, the Guidelines insist that the local government identify the source of "adverse cumulative impacts" and "fairly allocate the burden of addressing cumulative impacts among development opportunities." WAC 173-26-186(8)(d). The Guidelines also state that mitigation requirements may not demand land "in excess of that necessary to assure that development will result in

no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A). Thus, there is nothing in the SMA or WAC that would justify the City's decision to shift the burden of mitigating for preexisting offsite impacts onto new development.

Nor does the City's decision to set buffer widths based on the property's "shoreline designation" and geomorphic characteristics compel a different conclusion. Ecology Br. at 14–16. That is because proportionality requires a sufficiently "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Identifying the property's use designation is only one part of this analysis. Absent from the SMP's process (including the variance provision) is any requirement that the City evaluate the anticipated impacts of the proposed development. Ecology Br. at 14–18. Thus, Ecology's argument lacks any discussion of the role that project impacts play in setting buffer widths. Ecology Br. at 29–32. This failure

violates *Dolan* on its face. *Citizens' All. for Prop. Rts.*, 145 Wn. App. at 668–69.

CONCLUSION

For the foregoing reasons, and for the reasons set out in the Opening Brief, PRSM respectfully requests that the Court reverse the Growth Board decision and invalidate the challenged provisions of the City's 2014 SMP.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the rules of this Court and contains 5,982 words.

DATED: June 21, 2022.

Respectfully submitted,

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DECLARATION OF ELECTRONIC SERVICE

The undersigned declares that all parties' counsel will receive electronic notice of the filing of this document at the Washington State Appellate Courts' Portal.

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